2005

Donald J. Carvelas v. Summit Financial Resources L.P. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DONALD J. CARVELAS, Plaintiff/Appellant. vs. SUMMIT FINANCIAL RESOURCES, L.P. Defendant/Appellee,	Court of Appeals Case No. 20051111

BRIEF OF APPELLEE SUMMIT FINANCIAL RESOURCES, L.P.

On Appeal from Summary Judgment by the Third District Court,
Salt Lake County, State of Utah
Honorable Sandra N. Peuler, District Court Judge

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PARTIES TO THE PROCEEDINGS

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JURISDICTIONAL STATEMENT

Defendant concurs with Plaintiff's Statement of Jurisdiction.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the district court correctly determine that the employment contract was unambiguous with regard to the payment of bonuses and termination? The district court's determination that no ambiguity exists is a question of law, which this Court reviews for correctness. *E.g., Saleh v. Farmers Insurance Exchange,* 2006 UT 20, ¶ 14.

2. Did the district court correctly conclude that the undisputed facts show that Defendant fulfilled its obligations to Plaintiff under the employment contract? The district court's decision to grant summary judgment is reviewed for correctness. *E.g., Derbidge v. Mutual Protective Ins. Co.*, 963 P.2d 788, 790 (Utah Ct. App. 1998).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of, or of central importance to, the appeal.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

Appellant Don Carvelas ("Carvelas") was employed by Appellee Summit Financial Resources, L.P. ("Summit"), pursuant to a written employment agreement, on September 15, 1999. Carvelas' employment with Summit was terminated on April 6, 2005.

On May 26, 2005, Carvelas filed a Complaint against Summit for breach of his written employment agreement with regards to the payment of bonuses, and the procedure used by Summit to terminate his employment. (R. at 1-25.) Summit answered the Complaint denying the allegations. (R. at 26-34.) On July 28, 2005, Summit moved for summary judgment on the grounds that the employment contract was clear and unambiguous with regard to bonuses and termination, and as a matter of law, Summit fully met its contractual obligations to Carvelas. (R. at 35-64, 110-120.)

The district court heard arguments on Summit's motion on October 25, 2005, (R. at 129), and on November 1, 2005, the district court issued its Minute Entry decision granting Summit's motion *in toto*. The district court determined that the employment contract was unambiguous both as bonuses and termination of employment, and that Summit had met its contractual obligations to Carvelas. (R. at 130-32.) The district court entered its Findings of Fact, Conclusions of Law, and Order on November 29, 2005. (R. at 133-35.)

On November 30, 2005, Carvelas timely filed his notice of appeal of the district court's grant of summary judgment. (R. at 136-37.)

II. Statement of the Facts

A. Introduction

Summit is a financial services company providing financing to businesses. (R. at 61-62.) On September 15, 1999, Summit hired Carvelas as Vice President, Underwriting. The terms of Carvelas' employment were set forth in an employment contract also dated September 15, 1999 ("Employment Agreement"). (R. at 48-60; a complete copy of the

Employment Agreement is included in Summit's Appendix hereto.) According to the Employment Agreement, Carvelas was "[r]esponsible for analysis, structuring and due diligence process related to the underwriting of all factoring transactions," and "for the timely processing of all factoring transactions from receipt of [documents] from Client through the preparation, negotiation and execution of legal documentation." (R. at 58-59.)

Among its various provisions, the Employment Agreement: (1) provided that Plaintiff's employment was "at-will;" (2) stated that the Employment Agreement could be terminated at any time for cause or for no cause; (3) provided detail regarding the payment of a bonus for 1999; and (4) set forth a structure for determining contingent bonuses for the years 2000 through 2002. (R. at 48-53.) The Employment Agreement does not provide for any bonus, contingent or otherwise, past 2002. (R. at 48-60.)

In a letter to Carvelas dated April 6, 2005, Summit terminated Carvelas' employment, exercising its right under the Employment Agreement to terminate Carvelas' at-will employment "without cause," and citing as its basis, or grounds, the "at-will" provisions of the Employment Agreement. (R. at 64.) Some seven weeks later, Carvelas sued Summit for breach of the Employment Agreement, alleging that: (1) Summit wrongfully failed to pay a full bonus for 2000, and any bonus for 2001; (2) Summit wrongfully failed to pay any bonus for 2004; and (3) Summit failed to follow the proper procedure for terminating his employment by not disclosing to him a reason for his termination. (R. at 1-25.)

B. Relevant Contractual Provisions

The following contract provisions are relevant to Carevelas' claims:

1. Payment of Bonuses

The Employment Agreement provides for bonuses from 1999 through 2002, contingent upon the completion of goals and objectives as determined by the Chief Executive Officer. The relevant bonus provisions are § 3, Duties, § 4.2, Bonus, and, to a lesser extent, Exhibit B.

Section 3 states in relevant part that Plaintiff was to be "responsible for ... accomplishing the annual Performance Goals and Objectives set forth in Exhibit B," and that such "Goals and Objectives are subject to annual review, modification, and amendment in the discretion of the Chief Executive Officer." (R. at 48.) With regard to the annual Performance Goals and Objectives, Exhibit B states simply that they were "[t]o be determined and mutually agreed upon not later than August 31, 1999." (R. at 60.)

Section 4.2 set forth the calculation and contingency for the annual performance bonuses, stating that

> Based upon [Plaintiff's] completion of all or substantially all of the [goals and objectives] *as determined by the Company's Chief Executive Officer as set forth in Exhibit B as they may be revised, modified or amended pursuant to Paragraph 3...* the Employee shall accrue an annual bonus in the amount of (1) Ten Percent (10%) of his base salary for the period ending December 31, 1999 on a prorate basis; (2) Fifteen Percent (15%) of his base salary for the period ending December 31, 2000; (3) Twenty Percent (20%) of his base salary for the period ending December 31, 2001; and (4) Twenty Percent (20%) of his base salary for the period ending December 31, 2002.

(R. at 49, emphasis added.)

Exhibit B separately details the structure for determining the 1999 10% contingency bonus, stating that "[t]he successful completion of all or substantially all of these terms will entitle the Employee to receive a cash bonus equal to Ten Percent (10%) of Employee's base pay to be payable not later than April 15, 2000," and contains a default provision entitling Plaintiff to the 1999 bonus automatically if the Chief Executive Officer failed to hold a formal employment evaluation of Plaintiff prior to January 31, 2000. (R. at 60.)

2. At-Will Employment & Termination

The parties specifically agreed that Plaintiff's Employment was "at-will," declaring in Section 2 of the Employment Agreement that:

> The Company agrees to employ Employee and Employee agrees to accept employment with the Company on an "at will" basis. The Employee acknowledges that the Company may terminate his employment for any reason at any time, subject to the requirements of subparagraphs 6.2, 6.3, and 6.4 below to the extent that those provisions are applicable to the Employee's termination.

(R. at 48.)

With regard to termination without cause, the parties specifically agreed in Section 6.3 that Carvelas could be terminated "other than for cause," simply by Summit giving written notice to Carvelas, with the notice containing the grounds or basis for the termination, stating that "[t]he Company may terminate Employee other than for 'cause' upon written notice to the Employee. Such notice shall contain a statement of the grounds therefore." (R. at 53.) Nowhere does the Employment Agreement state that Summit must have, or give, a specific reason to terminate Carvelas.

3. Other Relevant Provisions

In addition to the bonus and termination provisions, the Employment Agreement contains the following relevant provisions:

- Waiver or Modification, § 12: "Any waiver, modification, or amendment of any provision of this Agreement shall be effective only if in writing in a document that specifically refers to this Agreement and such document is signed by the parties hereto." (R. at 56.)

- Entire Agreement, § 13: "This Agreement constitutes the full and complete understanding and agreement of the parties hereto with respect to the subject matter covered herein and supersedes all prior oral or written understandings and agreements with respect thereto." (*Id.*)

C. Payment of Bonuses by Summit

Summit did in fact pay Carvelas a bonus in 1999. This bonus was based in part upon its failure to hold a formal employee evaluation prior to January 31, 2000, which, according to Exhibit B to the Employment Agreement, automatically entitled Carvelas to the 1999 bonus without consideration as to whether he met goals and objectives. (R. at 62.)

In 2000, the Chief Executive Officer determined that no employee, including Carvelas, had fully met their individual and collective goals and objectives, and therefore paid only partial bonuses that year to all eligible employees, including a partial bonus to Carvelas. (*Id.*)

Similarly, in 2001, the Chief Executive Officer determined that no employee, including Carvelas, had met their individual and collective goals and objectives, and therefore no bonuses were paid. (*Id.*)

Summit Financial paid a full bonus to Carvelas for 2002, pursuant to the terms of the Employment Agreement. Additionally, while not contractually obligated to do so, Summit paid a bonus to Carvelas for 2003, as well. (R. 102-03.)

D. Termination of Carvelas' Employment

On April 6, 2005, Summit terminated Carvelas' employment by delivering written notice thereof to him. The letter specifically stated that, pursuant to the terms of the Employment Agreement, Summit was "exercising its right to terminate [Carvelas] without cause." (R. at 64.) Seven weeks later, Carvelas brought the action below for breach of the written employment contract, alleging that Summit wrongfully failed to pay him a bonus for 2000, 2001, and 2004, and that Summit wrongfully terminated his employment by failing to give him a reason. (R. at 1-25.)

E. Summary Judgment Proceedings

On July 25, 2005, Summit moved for summary judgment on all claims, on the grounds that the Employment Agreement was unambiguous as the payment of bonuses, and as to the termination of employment. (R. at 35-64.) Specifically, Summit argued that the payment of bonuses to Carvelas under the Employment Agreement were contingent upon the completion of goals and objectives, the determination of which was in the sole discretion of the Chief Executive Officer; that the CEO determined that Carvelas failed to meet the contingency for 2000 and 2001 and therefore Summit did not

pay him full bonuses for those years; that the agreement only obligated Summit for contingent bonuses through 2002; therefore, Summit had no contractual obligation for bonuses past 2002; and, pursuant to the Employment Agreement, Summit properly set forth as its basis for termination the at-will provisions of the Employment Agreement, stating that the termination was "without cause." (*Id.*)

The district court agreed, and granted Summit summary judgment in a minute order dated November 1, 2005. (R. at 130-131; a copy of the district court's Minute Entry is included in Summit's Appendix hereto.) In that order, the district court concluded that "the contract at issue in this matter is clear and unambiguous, both as to bonuses and termination of plaintiff's employment. (R. at 130.) With regard to bonuses through 2002, the district court concluded that "the contract clearly specifies that whether or not plaintiff met the goals and objectives of his employment was within the sole discretion of the chief executive officer." (*Id.*) With regard to Carvelas' claim that he was never advised of his goals and objectives, the court concluded it was "immaterial given the clear unambiguous terms of the contract." (*Id.*)

With regard to bonuses after 2002, the court concluded that, "quite specifically, the agreement provides for no bonuses after December 2002, and there is no ambiguity in that language." (R. at 131.)

Finally, with regard to the termination, the court determined that "plaintiff agreed that he could be terminated without cause. Again, the Court finds that there is no ambiguity in the terms and conditions of the contract, and that defendant terminated plaintiff without cause, specifying their basis as being without cause." (*Id.*) The district

court's decision was memorialized in the Findings of Fact, Conclusions of Law & Order entered on November 29, 2005. (R. at 133-35.)

SUMMARY OF ARGUMENT

The language of the Employment Agreement is clear and unambiguous regarding Summit's obligations to pay bonuses and Summit's right to terminate Carvelas' employment. The district court correctly determined that with regard to Carvelas' claim for bonuses for 2000 and 2001, that the Employment Agreement unambiguously vests in the CEO the discretion to determine bonus eligibility. The district court correctly concluded that the undisputed facts show that for 2000 and 2001, the CEO determined that Carvelas had not met his goals and objectives and therefore Summit paid no full bonuses for those years. His argument notwithstanding, Carvelas submitted no evidence to dispute the CEO's determination that Carvelas did not earn a full bonus for 2000 and 2001. Carvelas' argument the Employment Agreement is not fully integrated is not properly before this Court, as such a contention was raised first in this appeal. Nevertheless, the facts do not support Carvelas' claim.

With regard to bonuses after 2002, the district court correctly concluded that the Employment Agreement unambiguously provides for bonuses only through 2002, and therefore Summit had no contractual obligation to pay bonuses after that time. There is no ambiguity in the language of the Employment agreement by reason of missing terms, extrinsic evidence, or Carvelas' own strained reading of the plain language. Carvelas' alternate interpretation would improperly require the Court to read in significant additional language. Carvelas' contention that Summit created an implied-in-fact

contract is not properly before the Court because Carvelas is pursuing claims against Summit only for breach of his written Employment Agreement. Nevertheless, the facts do not support an implied-in-fact contract.

With regard to Summit's termination of Carvelas' employment, the district court correctly concluded that Carvelas agreed that his employment was at-will and could be terminated without cause. Carvelas' contention that Summit needed to provide a "reason" for the termination is not supported by the language of the contract, and would require the Court to improperly read in substitute language. Summit properly cited as its grounds the at-will provisions of the Employment Agreement.

ARGUMENT

DISTRICT COURT CORRECTLY DETERMINED THAT THE EMPLOYMENT AGREEMENT WAS CLEAR AND UNAMBIGUOUS AS TO BONUSES AND TERMINATION, AND THE DISTRICT COURT CORRECTLY FOUND THAT THE UNDISPUTED FACTS SHOWED THAT SUMMIT FULFILLED ITS CONTRACTUAL OBLIGATIONS TO CARVELAS

Summit moved the district court for summary judgment on Carvelas' claims that it had breached the Employment Agreement with regard to the payment of bonuses and termination, arguing that the Employment Agreement was unambiguous as to bonuses and termination, and as a matter of law it complied with its contractual obligations.

With regard to the payment of bonuses, the Employment Agreement provides, in Section three, that Carvelas is "responsible for ... accomplishing the annual Performance Goals and Objectives ... [which are] subject to annual review, modification, and amendment in the discretion of the Chief Executive Officer"; and, in section four, that "based upon [Carvelas'] completion of all or substantially all of the [goals and

objectives] *as determined by the Company's Chief Executive Officer as set forth in Exhibit B*[1] *as they may be revised, modified or amended pursuant to Paragraph 3...* the Employee shall accrue [a specified percentage of base salary for the years 1999, 2000, 2001, and 2002.] (R. at 49, emphasis added.)

With regard to termination, the Employment Agreement explicitly sets forth that Carvelas' employment was "at-will," stating in section two that "[t]he Company agrees to employ Employee and Employee agrees to accept employment with the Company on an "at will" basis [and that] the Company may terminate his employment for any reason at any time, subject to the requirements of subparagraphs ... 6.3 ... to the extent that those provisions are applicable to the Employee's termination." (R. at 48.) Referenced section 6.3, Termination without Cause, simply required Summit to give Carvelas written notice, with the notice containing the grounds or basis for the termination, stating that "[t]he Company may terminate Employee other than for 'cause' upon written notice to the Employee. Such notice shall contain a statement of the grounds therefore." (R. at 53.) Nowhere does the Employment Agreement state that Summit must have, or give, a specific reason to terminate Carvelas.

The district court correctly determined as a matter of law that the language of the Employment Agreement was clear and unambiguous with regard to the payment of bonuses, and the termination of plaintiffs' employment. Under the unambiguous terms of

[1] With regard to Carvelas' goals and objectives, Exhibit B merely states that they would be set by August 31, 1999.

the agreement, the district court properly determined that there were no disputed material facts and that Summit met its obligations to Carvelas both with regard to the payment of bonuses and termination.

A. The District Court Correctly Concluded that Summit Fulfilled its Obligations to Carvelas with Regard to 2000 and 2001 Bonuses.

Carvelas claims Summit breached the Employment Agreement by failing to pay him a full bonus for 2000, and any bonus for 2001. However, the district court properly determined that the Employment Agreement unambiguously vested the sole authority to pay bonuses in the Chief Executive Officer, based upon the CEO's determination as to whether Carvelas met his goals and expectations; and that because the CEO determined that such goals and expectations had not been met, Summit properly withheld partial and/or full bonuses for 2000 and 2001.

1. The Employment Agreement is Unambiguous with Regard to the Payment of Bonuses.

Carvelas argued below, and argues to this Court now, that the language of the Employment Agreement is ambiguous as to the payment of bonuses for the years 2000 and 2001, based on his "reasonable interpretation" of Exhibit B to the Employment Agreement. Additionally, Carvelas claims that alleged factual disputes regarding the existence of goals and objectives, or his knowledge of such goals and objectives, precluded the entry of summary judgment. Carvelas' arguments fail for at least three reasons. First, the operative language of the Employment Agreement, including Exhibit B, is clear on its face and vests discretion to determine goals, objectives, and bonuses solely in the CEO; second, Carvelas' alleged "factual dispute" is immaterial given the

discretion of the CEO over goals and bonuses; and third, Carvelas failed to present any evidence to dispute the fact that the CEO made the determination, in his discretion, that no one, including Carvelas, had met their individual and collective goals for 2000 and 2001, and therefore no, or partial, bonuses were paid for those years.

a. Standards for determining ambiguity

The question of whether a contract is ambiguous is decided by the court preliminarily as a matter of law. *E.g., Uintah Basin Medical Center v. Hardy,* 2005 UT App 92, ¶ 13 ("The question of whether a contract is ambiguous is decided by the court as a matter of law.... The court must first make a preliminary determination of ambiguity ...."). A contract provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Id.* (citations omitted). "A contract is ambiguous only if the words . . . may be understood to reach two or more possible meanings.... [A] part[y's] assertion of a different meaning does not in itself render a contract ambiguous." *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App. 28, ¶ 30 (citations omitted); *see also Camp v. Deseret Mutual Benefit Assoc.*, 589 P.2d 780, 782 (Utah 1979) ("A term is not necessarily ambiguous simply because one party seeks to endow it with a different meaning ....") Even if a term is imprecise, it is not ambiguous "if persons of competent skill and knowledge are capable of understanding the plain meaning." *Hardy,* 2005 UT App 92 at ¶ 13. An alternate interpretation does not merit consideration if it is a "forced or strained construction." *Saleh v. Farmers Insurance Exchange*, 2006 UT 20, ¶ 17.

b. 2000 and 2001 bonuses are at the discretion of the CEO.

The district court correctly determined that the Employment Agreement plainly vests the sole authority to pay bonuses in the Chief Executive Officer, based upon a determination of whether Carvelas met certain goals and objectives, which themselves are subject to the discretion of the Chief Executive Officer. Such bonuses are discussed clearly and unambiguously in section 4.2, Bonus, and section 3, Duties.

Section 4.2 states in relevant part:

> Based upon [Carvelas'] completion of all or substantially all of the [goals and objectives] *as determined by the Company's Chief Executive Officer as set forth in Exhibit B*[2] *as they may be revised, modified or amended pursuant to Paragraph 3* ... [Carvelas] shall accrue an annual bonus in the amount of ... (3) Twenty Percent (20%) of his base salary for the period ending December 31, 2001; and (4) Twenty Percent (20%) of his base salary for the period ending December 31, 2002.

(R. at 49, emphasis added.)

In Section 3 of the Employment Agreement, Carvelas specifically acknowledged that his goals and objectives were at the sole discretion of the Chief Executive Officer:

> Employee acknowledges that such Goals and Objectives are *subject to annual review, modification, and amendment in the discretion of the Chief Executive Officer.*

(R. at 48, emphasis added.)

The plain language of the Employment Agreement thus provides that the 2001 and 2002 bonuses were contingent upon a determination solely by the CEO that Carvelas had

[2] Recall that exhibit B merely states that goals would be set by August 31, 1999.

met goals and objectives, which themselves were subject to the determination of the CEO.

c. Exhibit B unambiguously explains only the 1999 bonus.

Carvelas does not necessarily dispute the CEO's exclusive authority to determine bonuses. Rather, Carvelas argues to this Court that Exhibit B raises an ambiguity as to the extent of the CEO's authority, claiming that a reasonable alternate interpretation of Exhibit B is that because the Chief Executive Officer failed to conduct a formal review of Carvelas on or before January 31, 2000, that Carvelas should somehow deemed to have earned bonuses through 2002. (Br. Aplt. 15-16.)

Carvelas' forced, strained interpretation of Exhibit B ignores its plain language and does not merit the Court's consideration. *Saleh,* 2006 UT 20 at ¶ 17 ("[T]o merit consideration as an interpretation that creates an ambiguity, the alternative rendition 'must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction.'")

Carvelas' overstates the importance of Exhibit B. According to its plain language (i.e., its "natural and usual meaning," *Saleh,* 2006 UT 20 at ¶ 17) Exhibit B serves only two functions. First, it served as the starting point for Carvelas' goals and objectives. With regard to those goals and objectives it states, simply, "To be determined and mutually agreed upon not later than August 31, 1999." (R. at 60.) With regard to the goals and objectives it says nothing more. This sentence is the *only* connection between Exhibit B and the reference in sections 3 and 4.2 to Exhibit B's Goals and Objectives. Given the modification and amendment language of sections 3 and 4.2 granting sole

discretion to the CEO, Exhibit B was clearly just the starting point for Carvelas' goals and objectives. Indeed, a determination of bonuses beyond 1999, and specifically for 2000 and 2001, would be made wholly without reference to Exhibit B. There simply is no ambiguity created by Exhibit B with regard to the 2001 and 2002 bonuses.

The second function of Exhibit B was to set forth the determination of Carvelas' bonus for 1999, and adding a default provision to the effect that Carvelas would be deemed to have earned that bonus if the CEO failed to conduct a performance review of Carvelas on or before January 31, 2000. In that regard, Exhibit B states:

> The successful completion of all or substantially all of these terms will entitle the Employee to receive a cash bonus equal to Ten Percent (10%) of Employee's base pay to be payable not later than April 15, 2000.
>
> The Company's Chief Executive Officer ("CEO") or designee will conduct a formal review of Employee's performance on or before January 31, 2000. In the event this review does not take place by January 31, 2000, Employee will be deemed to have successfully completed all or substantially all of the required goals and objectives.

(R. at 60.)

Summit admits that this language in fact limited the CEO's ability to determine Carvelas' 1999 bonus. Indeed, Summit paid Carvelas his full 1999 bonus in part because it failed to conduct a formal review on or before January 31, 2000. (R. at 61-62.) Nevertheless, Carvelas' "alternate" interpretation that this language somehow strips the CEO's discretion to determine bonuses after 1999 is neither plausible nor reasonable. Such an interpretation would require the Court to "read in" significant contrary language—something the Court cannot do. *E.g., Saleh,* 2006 UT 20 at ¶ 18 (refusing to read "until repair or replacement is completed" as meaning "until significant repair or

replacement is completed," and stating that "[t]o import the term 'significant' into the phrase is to change the meaning of 'complete' to 'incomplete.'").

The district court properly determined that the Employment Agreement was unambiguous with regard to the 2000 and 2001 bonuses, and that the contract granted sole discretion to the Chief Executive Officer.

2. The Undisputed Facts Show that Summit Met its Obligations to Carvelas with regard to the 2000 and 2001 Bonuses.

The district court correctly determined that there were no factual disputes regarding whether the CEO determined in his discretion that no one, including Carvelas, had fully met their goals and objectives for 2000, and therefore received only a partial bonus; or that no one, including Carvelas, had met their goals and objectives for 2001, and therefore no bonuses were paid. Indeed, the record shows no factual dispute regarding the CEO's determination for 2000 and 2001.

Instead, Carvelas claims an entirely different factual dispute as to whether goals were ever established, claiming by affidavit that during his tenure, no one "ever informed [him] of any modification to the performance goals and objectives stated in Exhibit B of the Employment Agreement, or ever, to the best of [his] knowledge, actually established specific performance goals and objectives for [him] or actually compared [his] performance to any such performance goals and objectives." Nevertheless, Carvelas' alleged factual dispute is immaterial, as the district court correctly found.

While Summit Financial disagrees that Carvelas did not know what the goals and objectives were, such a "factual dispute" is immaterial. That plaintiff necessarily

understands the goals, or agrees with their periodic modification or amendment, is not a contractual burden of Summit. As the Employment Agreement makes clear, goals and objectives were within the purview of the Chief Executive Officer, not Carvelas. It was the CEO's responsibility, and rightfully so, to navigate the business waters, making course corrections and changing goals and objectives, as necessary. Thus, the Employment Agreement vested in the CEO, and not Carvelas, the exclusive authority to set, change, rearrange, etc., the individual and collective goals and objectives, and then to determine whether the employees, including Carvelas, merited a bonus based upon results. Summit's sole contractual obligation with regard to the 2000 and 2001 bonus, was to pay a bonus to Carvelas if the CEO determined that Carvelas had reached the CEO's goals and objectives for him. If Carvelas truly did not understand his goals and objectives, then it was his burden to educate himself. Summit cannot be charged with his alleged ignorance or misunderstanding.

3. Carvelas Submitted No Disputing Evidence that the CEO Determined Carvelas had not Met his Goals and Objectives, and Failed to Request Additional Discovery.

Carvelas' argues that the 2000 and 2001 bonus determination must be based on some objective criteria, or some other evidence of poor performance. Carvelas criticizes Summit for the lack of objective evidence, suggesting that CEO Gordon LaHaye's "post-lawsuit fabrication," (Br. Aplt. at 14), is somehow unworthy of the Court's consideration. In fact, it is Carvelas who has failed to produce contrary evidence.

Summit asserted the following via affidavit by Mr. LaHaye:

> For the year 2000, it was determined that no employee, including Mr. Carvelas, fully met their individual and collective goals and expectations, and so Summit Financial paid only partial bonuses, including a reduced bonus of 7.5% of base salary to Mr. Carvelas. ... For the year 2001, it was determined that no employee, including Mr. Carvelas, had met their individual and collective goals and objectives, and therefore Summit Financial paid no bonuses.

R. at 61-62.)

On summary judgment, the moving party, in this case Summit, bore the initial burden of demonstrating the absence of a genuine issue of material fact, which it did via affidavit. Thereafter, Carvelas could not rest on mere allegations or denials, or statements such as "post-lawsuit fabrication," but had the burden to then set forth specific contrary facts showing a genuine issue for trial. Utah R. Civ. P. 56(e); *Speros v. Fricke*, 2004 UT 69, ¶23 ("When a motion for summary judgment is made and supported as provided in this rule [e.g., by an affidavit], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.") Other than claiming that he never knew of his goals and objectives, Carvelas has pointed to no credible evidence that in fact the CEO did not make the determinations that he averred to by sworn affidavit.

Carvelas also argues that Summit's motion is premature, that "[n]ow prior to discovery, is not the appropriate time to resolve the factual question whether Mr. Carvelas actually met those goals," and that "Mr. Carvelas should be given the opportunity to show that Mr. LaHaye's rationale ... is false." (Aplt. Br. 18-19.) Carvelas argument fails for at least two reasons. First, if Carvelas truly felt that discovery was

needed, he could have made a Rule 56(f) motion to request such discovery. He did not, therefore the issue is not properly before this Court. *See, e.g., Schoney v. Memorial Estates,* 790 P.2d 584, 586 n. 5 (Utah Ct. App. 1990) ("Plaintiffs argue no prejudice actually resulted because the interrogatories sought information which was duplicative, extraneous, and unimportant. If this were true, a timely objection or motion for protective order would have been in order. Neither was made. We decline to consider this contention for the first time on appeal.").

Second, Carvelas' argument belies the plain language of the Employment Agreement. The CEO's determination of whether Carvelas merited a bonus for 2000 and 2001 was in the CEO's *sole discretion.* It was not a collaborative process, or limited to performance reviews, or based upon the presence or lack of criticism of Carvelas.

Summit met its obligation to pay bonuses properly earned by Carvelas. The undisputed facts show that the CEO determined, in his sole discretion, that Carvelas did not fully earn bonuses for 2000 and 2001, and therefore Summit properly did not pay such bonuses to him. Carvelas did not dispute this fact, and the district court properly granted Summit summary judgment.

B. The District Court Correctly Concluded that Summit was not Contractually Obligated to Pay Bonuses to Carvelas After 2002.

The district court also correctly determined that the language of the Employment Agreement was clear and unambiguous in not providing for contractually-obligated bonuses past 2002, and therefore Summit was not required to pay any bonus in 2004.

1. The Employment Agreement Unambiguously Provides for Bonuses Only Through 2002.

Carvelas argues to this Court that the Employment Agreement is ambiguous as to the payment of bonuses after 2002, because such bonuses are not specifically mentioned in the text of the agreement. He argues that extrinsic evidence regarding conversations about bonuses is necessary to determine the intent of the parties. Carvelas' arguments fail for at lest four reasons. First, the explicit language of the Employment Agreement only requires contingent bonuses through 2002. Second, simply because the Employment Agreement does not specifically exclude bonuses for 2003 and beyond does not render it ambiguous as to such bonuses. Third, Carvelas' alleged alternate interpretation based upon his "extrinsic evidence" is not supported by the plain language of the contract and thus such evidence provides no basis for finding an ambiguity. Fourth, Carvelas' alternate interpretation would improperly require the Court read in significant additional language, effectively rewriting the agreement for the parties.

a. The Employment Agreement provides for bonuses only through 2002.

The Employment Agreement specifically provides for bonuses through 2002, stating in clear, unambiguous terms that stating that

> Based upon [Plaintiff's] completion of all or substantially all of the [goals and objectives] as determined by the Company's Chief Executive Officer as set forth in Exhibit B as they may be revised, modified or amended pursuant to Paragraph 3... the Employee shall accrue an annual bonus in the amount of (1) Ten Percent (10%) of his base salary for the period ending December 31, 1999 on a prorate basis; (2) Fifteen Percent (15%) of his base salary for the period ending December 31, 2000; (3) Twenty Percent (20%) of his base salary for the period ending December 31, 2001;

> and (4) Twenty Percent (20%) of his base salary for the period ending December 31, 2002.

(R. at 49, emphasis added). In explicit terms, Summit agreed to pay a bonus to Carvelas if he met his goals and objectives for the years 1999, 2000, 2001, and 2002, respectively. The Employment Agreement clearly specifies the amount of the bonus during each of those years that Summit would be obligated to pay if the CEO determined that Carvelas had met his goals and objectives. Thus, for example, if the CEO determined that Carvelas met his goals and objectives during 2000, then per the terms of the Employment Agreement, Summit would be contractually obligated to pay Carvelas a bonus in the amount of 15% of his base salary. The language is clear and unambiguous. Thus, the district court correctly determined that "quite specifically, the agreement provides for no bonuses after December 2002, and there is no ambiguity in that language." (R. at 131.)

b. The Employment Agreement has no "missing terms" with regard to bonuses after 2002.

A contract provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *E.g., Hardy,* 2005 UT App 92 at ¶ 13 (citations omitted). With regard to post-2002 bonuses, Carvelas has not claimed uncertain meanings of terms, or other facial deficiencies. Rather, he implies that because the Employment Agreement does not provide for bonuses after 2002, that post-2002 bonuses are necessarily "missing." (Br. Aplt. at 19-20.) Carvelas' misunderstands the application of the term "missing." In determinations of ambiguity, a term is deemed "missing" only when it is in itself

essential to the interpretation of contractual provisions, not as a supplement to otherwise clear contractual obligations.

For example, in *Cox v. Cox,* 877 P.2d 1262 (Utah Ct. App. 1994), this Court interpreted a prenuptial agreement wherein the husband represented the value of his premarital property at $380,000. Contemporaneously, the husband and wife executed a warranty deed whereby the husband transferred an undivided ½ interest in his house to the wife. Neither agreement referenced the other. In dividing the parties' assets post-divorce, the court concluded that the prenuptial agreement was ambiguous because it did not state whether the $380,000 included the full value of the house or not. It was deemed a "missing" term by the court. *Id.* at 1269.

Similarly, in *Nielsen v. Gold's Gym*, 2003 UT 37, the Utah Supreme Court considered a commercial lease agreement, and the payment for tenant improvements. The lease in question was for the "premises" located at "A strip mall at 1341 E Center Spanish Fork, UT," to be used solely as a "Health Club & Gym." *Id.* at ¶ 2. When the lease was signed the building was still under construction, and there was no provision as to who was financially responsible for turning the "premises" into a "Health Club & Gym." The court determined that such a term was essential, but was missing, and therefore the agreement was ambiguous. *Id.* at ¶¶ 7-10.

In both of the cases above, the missing terms were deemed essential to interpreting the agreed upon obligations of the parties. Without such missing terms, the obligations of the parties could not be enforced. In contrast, the terms Carvelas claims are "missing" from the Employment Agreement are not essential to determining the parties' obligations.

The obligations themselves are clear: for the years 1999, 2000, 2001, and 2002, Summit is obligated to pay Carvelas a bonus if certain conditions are met. There is no ambiguity in the language. Carvelas' supposed extrinsic evidence is not needed to interpret this clear language. The Employment Agreement is not "missing" any terms with regard to post-2002 bonuses that render it ambiguous. There simply was no agreement for bonuses after 2002.

In essence, Carvelas claims that an agreement is necessarily ambiguous if it is "missing" terms that the parties chose not to address. Carvelas' position, the result of which would be to turn every contract into a lengthy testament of exclusions, is contrary to logic and contract law. *See, e.g., Blackie v. State of Maine*, 75 F.3d 716, 721 (1st Cir. 1996) ("Nor must a contract 'negate every possible construction of its terms in order to be unambiguous.'")

c. Carvelas' alleged extrinsic evidence is not supported by the plain language of the contract and provides no basis for finding an ambiguity.

Carvelas' "alternate" interpretation is not supported by the plain language of the Employment Agreement. As this Court noted in *Novell, Inc. v. The Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, if the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language." (Quoting *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶¶ 19-20.) Nevertheless, Carvelas argues that the Court must necessarily consider his extrinsic evidence, and when doing so, would find an ambiguity. Carvelas' argument is misfounded. While it is true that in determining whether a contract term is ambiguous

a "court *may* look to all the attendant circumstances surrounding the execution of the document," *id.* at ¶ 21, the court should not consider extrinsic evidence unless "the interpretations contended for are reasonably supported by the language of the contract." *Id.* (citing to *Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Utah 1995)). In this case, Carvelas has offered no extrinsic evidence regarding the "attendant circumstances surrounding the execution of the document" beyond his allegations that he understood he would receive bonuses after 2002. Regardless of whether his extrinsic evidence is taken into account or not, Carvelas' alternate interpretation is certainly not supported by the clear language of the Employment Agreement, and provides no basis for finding an ambiguity. Thus, the District Court correctly concluded that no extrinsic evidence was required to provide meaning to the contract. (R. 130-31.)

d. The Court should not read additional language into the Employment Agreement.

Carevelas' interpretation would require the Court to read in significant additional language, expanding the scope of the Employment Agreement and create significant new obligations—essentially rewriting the agreement to include provisions not originally provided. This the Court cannot do. *E g., Provo City Corp. v. Nielson Scott Co.,* 603 P.2d 803, 806 (Utah 1979) (holding that a court cannot rewrite an unambiguous contract); *Rio Algom Corp. v. Jimco Ltd.,* 618 P.2d 497, 505 (Utah 1980) (holding that a court cannot write for the parties a better contract than they wrote); *Saleh,* 2006 UT 20 at ¶ 18 (refusing to read "until repair or replacement is completed" as meaning "until significant

repair or replacement is completed," and stating that "[t]o import the term 'significant' into the phrase is to change the meaning of 'complete' to 'incomplete.'").

2. Carvelas' Strained "Alternate Interpretation" is Contrary to the Integration and Modification Provisions in the Employment Agreement.

Additionally, Carvelas argues to this Court that the Integration and Modification Provisions of the Employment Agreement create a factual issue as to whether the Employment Agreement is fully integrated on the question of post-2002 bonuses, and that therefore the Court should consider his "extrinsic evidence" of conversations regarding bonuses to clear up the resultant ambiguities. Carvelas' argument fails for the simple reason that the issue of integration was not raised in the district court below and this Court should not consider it for the first time on appeal. Beyond that procedural bar, however, Carvelas has not overcome the presumption of integration.

a. Carvelas' alternate interpretation of the Employment Agreement with regard to post-2002 bonuses is contrary to the integration and modification provisions of the agreement.

In interpreting a contract, the Court should "look to the writing itself to ascertain the parties' intentions, and . . . consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." *Jones v. ERA Brokers Consol.*, 2000 UT 61, ¶ 12, 6 P.3d 1129. The terms of a contract "should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions." *Nielson v. O'Reily*, 848 P.2d 664, 665 (Utah 1992). Carvelas' alternate interpretation of the Employment Agreement with regard to post-2002 bonuses flies in the face of, and

renders meaningless, the explicit integration and modification provisions of the agreement. In section 13 of the Employment Agreement, the parties specifically agree and acknowledge that the Employment Agreement "constitutes the full and complete understanding and agreement of the parties hereto with respect to the subject matter covered herein and supersedes all prior oral or written understandings and agreements with respect thereto." (R. at 56.) Additionally, section 12 provides that "Any waiver, modification, or amendment of any provision of this Agreement shall be effective only if in writing in a document that specifically refers to this Agreement and such document is signed by the parties hereto." (*Id.*) Carvelas' alternate interpretation, based largely on supposed extrinsic evidence of prior oral conversations, would require a significant modification and amendment of the Agreement, in direct conflict with these provisions.

b. Carvelas' integration argument is not properly before the Court; nevertheless, Carvelas cannot overcome the presumption of integration.

Carvelas claims for the first time on appeal that the Employment Agreement was not integrated on the question of whether bonuses would continue beyond 2002. The Court should not consider issues raised for the first time on appeal. *E.g., Carrier v. Salt Lake County*, 2004 UT 98, ¶ 43 ("[A]s a general rule we decline to address issues raised for the first time on appeal.")

But beyond that obvious procedural hurdle, Carvelas' claim on integration gets him nowhere, because Carvelas' evidence does not overcome the presumption of "integration" of the Employment Agreement. In *Novell, Inc. v. The Canopy Group, Inc.*, 2004 UT App 162, the court considered a licensing agreement obligating Canopy to pay

royalties to Novell, including a certain percentage of any recoveries from lawsuits. *Id.* at ¶ 4. Subsequently, Canopy recovered on a lawsuit, but before calculating Novell's royalty percentage, Canopy deducted attorney fees and other costs based upon what Canopy described as a contemporaneous oral agreement regarding the calculation of the royalty base. *Id.* at ¶ 6. On appeal of summary judgment to Novell, Canopy argued that the written contract was not fully integrated but that the parties contemporaneously entered into an oral agreement regarding the royalty base, and did not intend that the written agreement supersede the oral agreement.

The court first noted that an "agreement is integrated where the parties thereto adopt a writing ... as the final and complete expression of that agreement," and that in considering this preliminary question, the court applies a rebuttable presumption of integration. *Id.* at ¶¶ 10-11. In that regard, the court stated that, "[R]egardless of whether the parties may have had preliminary agreements about a given subject during the course of negotiations, we will assume that *a writing dealing with the same subject matter was intended by the parties to supersede any prior or contemporaneous agreements.*" *Id.* at ¶ 14 (emphasis added). The court noted that Canopy "produced a great deal of evidence to establish that the written agreements do not contain all the terms to which the parties agreed," but also noted that Canopy conceded that it entered into written agreements that provide for the payment of royalties to Novell. *Id.* at ¶ 13. The court concluded that, with regard to royalties, Canopy had not overcome the presumption of integration, and that "Canopy's arguments and evidence ... are entirely irrelevant to rebut the

presumption that the parties intended to replace their prior agreements with a new agreement in the form of the final writings." *Id.* at ¶ 14.

Similarly, in this case Carvelas does not dispute that he entered into the Employment Agreement which specifically provides for contingent bonuses only through 2002. Instead, he offers evidence of what he describes as contemporaneous agreements to pay bonuses past 2002. However, none of Carvelas' evidence goes to whether the parties intended to keep such alleged oral agreements in light of the written agreement. As such, Carvelas' "evidence" is "entirely irrelevant to rebut the presumption that the parties intended to replace their prior agreements with a new agreement in the form of the final writings." *Id.* at ¶ 14.

3. The Issue of Implied-in-Fact Contract is Not Properly Before this Court; Nevertheless, the Evidence of Record Does Not Support Plaintiff's Claim of an Implied-in-Fact Contract.

As a last resort, Carvelas contends that the Court should find an implied-in-fact contract for the payment of bonuses post-2002. This claim is not properly before the Court because Carvelas has not sued Summit under breach of an implied contract theory. *See, Wright v. University of Utah,* 876 P.2d 380, 386 (Utah Ct. App. 1994) (refusing to consider plaintiff's alternate theory, and stating that "the fact that the University became aware of Wright's various alternate theories during the proceedings on the University's motion does not relieve her of her obligation to state a claim in her complaint."); *Smith v. Grand Canyon Expeditions Co.,* 2003 UT 57, ¶ 29 (affirming dismissal of tort punitive damage claim, and stating that plaintiff "failed to plead any tort claims until his brief before this court ... [which] vague assertions ... coupled with the absence of a tort claim

in his complaint, do not rise to the level of a properly pleaded tort.") A review of Carvelas' Complaint in this case shows that Carvelas has not pleaded an implied-contract theory. Carvelas' Complaint makes it clear that he is proceeding *solely* under breach of the written Employment Agreement. (R. at 1-9 (Pltfs. Complaint, ¶¶ 1, 8-17, 23, 25-28, 33).)

Plaintiffs' failure to plead notwithstanding, Carvelas cannot establish an implied-in-fact contract for bonuses. "[C]reation of an implied-in-fact employment contract requires evidence of a specific, affirmative, and definite manifestation of the employer's 'clear and unequivocal intention [to create a contract]'." *Francisconi v. Union Pac. R.R. Co.*, 2001 UT App 350, ¶ 12 (citations omitted). Moreover, Carvelas must show "a manifestation of [Summit's] intent that is communicated to [Carvelas] and [is] sufficiently definite to operate as a contract provision. Furthermore...'such evidence must be strong enough to overcome ... any inconsistent written policies and disclaimers.'" *Kirberg v. West One Bank*, 872 P.2d 39, 41 (Utah App. 1994) (citations omitted).

Even considering Carvelas' facts in the light most favorable to him, Carvelas has produced no evidence of specific, affirmative manifestations by Summit sufficient to bind itself to Carvelas for bonuses until the end of his employment. Moreover, Carvelas' alleged evidence is insufficient to overcome the contrary provisions of the Employment Agreement providing for contractually-obligated bonuses only through 2002, invalidating prior or contemporaneous statements, and proscribing oral modification of the Employment Agreement.

C. The Employment Agreement is Unambiguous with regards to the Termination of Carvelas' Employment, and the Undisputed Facts Show that Summit Properly Terminated the Employment Relationship.

Carvelas argues before this Court that Summit failed to follow proper procedure when terminating him because it failed to give him a "reason" for his termination. Carvelas' argument fails because his "reasonable interpretation" is contrary to the language and plain meaning of the Employment Agreement, which provisions are clear and unambiguous. Summit properly terminated Carvelas' employment in writing, stating that the termination was without cause. The district court correctly concluded that Summit adhered to the requirements of the Employment Agreement. In that regard, the district court concluded that "plaintiff agreed that he could be terminated without cause," that "there is no ambiguity in the terms and conditions of the contract, and that [Summit] terminated [Carvelas] without cause, specifying [its] basis as being without cause." (R. at 131.)

1. There is No Ambiguity in the Termination Provisions of the Employment Agreement, and Summit Properly Terminated Carvelas.

The record is clear that Summit adhered to the terms of the Employment Agreement in terminating Plaintiff's at-will employment without cause, and upon those grounds. The termination provisions of the Employment Agreement are set forth unambiguously in two provisions: Section 2 states that "the Company may terminate [plaintiff's] employment for any reason at any time, subject to the requirements of subparagraphs 6.2, 6.3, and 6.4 below to the extent that those provisions are applicable to

the Employee's termination"; and with regard to termination without cause, Section 6.3 states that "[t]he Company may terminate Employee other than for 'cause' upon written notice to the Employee. Such notice shall contain a statement of the grounds therefore." (R. at 48, 53.)

The undisputed facts show that Summit terminated Carvelas "upon written notice," which written notice "contain[ed] a statement of the grounds therefore," namely that Carvelas was being terminated without cause, based upon the at-will provisions of the agreement.

Carvelas claims that, instead, Summit was required to give a "reason" for the termination. Thus, Carvelas urges the Court to rewrite the Employment Agreement, replacing the term "grounds" with the term "cause" or "reason," and eviscerating the at-will provisions of the agreement. This the Court cannot do. *E.g., Saleh,* 2006 UT 20 at ¶ 18 (refusing to read "until repair or replacement is completed" as meaning "until significant repair or replacement is completed," and stating that "[t]o import the term 'significant' into the phrase is to change the meaning of 'complete' to 'incomplete.'"). Such a modification would completely alter the at-will provisions of the Employment Agreement, and significantly restrict Summit's ability to otherwise terminate Carvelas without cause.

There is no ambiguity to the word "grounds" such that the Court should substitute a more restrictive word in its place. "Grounds" is commonly understood to encompass more than just a simple "reason." Black's Law Dictionary, Sixth Edition, defines "grounds" as "[a] foundation or basis; points relied on." Summit Financial provided just

that—its foundation, or provision relied upon, for the termination, i.e., the "other than for cause" provision of the Employment Agreement. Just because Carvelas ascribes a different meaning to the term does not thereby create an ambiguity. *Camp v. Deseret Mutual Benefit Assoc.*, 589 P.2d 780, 782 (Utah 1979) ("A term is not necessarily ambiguous simply because one party seeks to endow it with a different meaning ...."). Carvelas' limiting interpretation does not merit consideration. *Saleh v. Farmers Insurance Exchange*, 2006 UT 20, ¶ 17 (alternate interpretation does not merit consideration if it is a "forced or strained construction.").

Moreover, Carvelas' interpretation is contrary to the at-will and termination without cause provisions of the agreement. In interpreting a contract, the Court must "consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." *Jones v. ERA Brokers Consol.*, 2000 UT 61, ¶ 12, 6 P.3d 1129. The terms of a contract "should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions." *Nielson v. O'Reily*, 848 P.2d 664, 665 (Utah 1992). Carvelas is, in effect, asking the Court to ignore the at-will provisions of Section 2, aptly entitled "Employment At Will," and stating that "[t]he Company agrees to employ Employee and Employee agrees to accept employment with the Company on an "at will" basis." (R. at 48.) Additionally, Carvelas' interpretation would require the Court to overlook the termination without cause provisions in section 6.3, entitled "Termination of Employee without Cause," wherein Carvelas agreed that "[t]he Company may terminate Employee other than for 'cause' upon written notice to the Employee." (R. at 53.)

2. Taking Into Account All Contractual Provisions, Summit Properly Terminated Carvelas' Employment.

Carvelas does not necessarily dispute that his employment with Summit was "at-will," or that Summit could terminate him at any time; only that Summit was contractually obligated to state a "reason, however trivial, capricious, unrelated to business needs or goals, or pretextual it may have been." (Br. Aplt. at 31.) Rather than take into consideration and harmonize all contractual provisions, Carvelas' interpretation of the Employment Agreement is contrary to the explicit terms of the Employment Agreement. *E.g., Jones v. ERA Brokers Consol.*, 2000 UT 61, ¶ 12 (in interpreting a contract, the court should "consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none."; *Nielson v. O'Reily*, 848 P.2d 664, 665 (Utah 1992) (stating that the terms of a contract "should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.").

In section two of the Employment Agreement, Carvelas specifically agreed that his employment was "on an 'at-will' basis." (R. at 48.) By definition, "at-will" means that Carvelas could be fired for any or no reason. *E.g., Brehany v. Nordstrom,* 812 P.2d 49, 53-55 (Utah 1991). Yet Carvelas argues that his "at-will" employment was nevertheless limited by the requirement of explicitly stating a reason for termination. While Carvelas attempts to minimize the obvious conflict between his interpretation and the at-will provisions of the agreement by stating that the "reason" could be anything, however trivial, pretextual, etc., (Br. Aplt. at 31), Carvelas would have this Court read in a requirement in *direct conflict* to Section two's "at-will" provision. *E.g., Brehany,* 812

P.2d at 53-55. While Summit acknowledges that in order to terminate Carvelas under the Employment Agreement it was required to give him written notice, such requirement did not alter its fundamental ability to terminate Carvelas' at-will employment with or without reason.

Section two of the Employment Agreement offers resolving language. Even if the Court were to accept Carvelas' interpretation and substitute the word "reason" for "grounds," Section 2 of the Employment Agreement still would apply to allow Summit to terminate Carvelas' employment without an explicit reason in the event it exercised the at-will provisions of the Employment Agreement. Section 2 of the Employment Agreement states that Plaintiff's employment can be terminated "subject to the requirements of subparagraphs ... 6.3 ... *to the extent that th[at] provision[] [is] applicable to the Employee's termination.*" (R. at 48, emphasis added).) Thus, according to the plain language of the Employment Agreement taken as a whole, to the extent Summit exercised its at-will rights to terminate Carvelas' employment without a reason, then section 6.3's substituted requirement of explicitly stating a reason would be "inapplicable" and not required, per section two of the agreement.

CONCLUSION

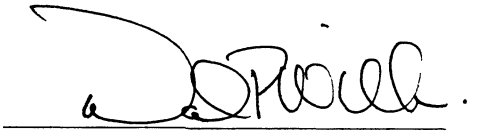
The district court correctly concluded that the Employment Agreement was clear and unambiguous as to the payment of bonuses and termination of employment. The district court correctly determined that with regard to Carvelas' claim for bonuses for 2000 and 2001, that the Employment Agreement unambiguously vests in the CEO the discretion to determine bonus eligibility. The district court correctly found that the

undisputed facts show that Summit complied with its obligations with regard to bonuses for 2000 and 2001. With regard to post-2002 bonuses, the district court correctly that the Employment Agreement unambiguously provides for bonuses only through 2002, and therefore Summit had no contractual obligation to pay bonuses after that time. Finally, the district court correctly concluded that Carvelas agreed that his employment was at-will and could be terminated without cause and that Summit met its contractual obligations with regard to terminating Carvelas' employment.

For the reasons set forth above, this Court should affirm the judgment of the district court in all regards, dismissing Carvelas' Complaint on the merits and with prejudice.

Dated this 24th day of April, 2006.

Snell & Wilmer L.L.P.

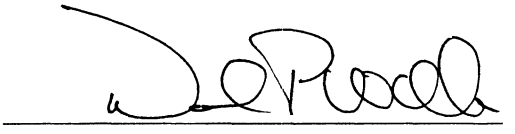


David P. Williams
Attorneys for Appellee
Summit Financial Services, L.P.

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two true and accurate copies of the foregoing, postage prepaid, via First Class U.S. Mail on the 24th day of April, 2006, to:

Gregory W. Stevens
Cottonwood Corporate Center
2825 East Cottonwood Parkway, Suite 500
Salt Lake City, Utah 84121-7060



APPENDIX

Contents

1. Employment Agreement dated September 15, 1999.

2. Minute Entry decision dated November 1, 2005.

Tab 1

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT (the "Agreement) is entered into as of August 15, 1999, (the "Effective Date") by and between ALTRES FINANCIAL, L.P. a Hawaii limited partnership (the "Company") and Donald J. Carvelas (the "Employee").

In consideration of the promises and mutual covenants contained herein, the parties hereto agree as follows:

1. Employment Location

The Company hereby employs Employee and Employee hereby accepts such employment in Salt Lake City, Utah or in such other location as may be mutually agreed upon between the parties.

2. Employment At Will

The Company agrees to employ Employee and Employee agrees to accept employment with the Company on an "at will" basis. The Employee acknowledges that the Company may terminate his employment for any reason at any time, subject to the requirements of subparagraphs 6.2, 6.3, and 6.4 below to the extent that those provisions are applicable to the Employee's termination.

3. Duties

Employee shall be the Vice President, Underwriting, of the Company. Employee shall diligently execute such duties and shall devote his full-time skills and efforts to such duties during ordinary working hours. Employee shall be responsible for performing his duties in compliance with the accountabilities in the Job Description set forth in Exhibit A and for accomplishing the annual Performance Goals and Objectives set forth in Exhibit B, attached hereto respectively. Employee acknowledges that such Goals and Objectives are subject to annual review, modification, and amendment in the discretion of the Chief Executive Officer to reflect changes in performance criteria, and that such updated Goals and Objectives shall constitute a part of this Agreement.

Employee shall report to, and perform all duties subject to the general supervision and control of, the Chief Executive Officer, who shall have the power to make all determinations required by or pursuant to this Contract.

4. Compensation and Benefits

The Company shall pay Employee, and the Employee shall accept as full compensation for all services to be rendered to the Company under this Agreement, the following compensation and benefits:

4.1 Salary. The Company shall pay Employee an annual salary of Eighty Five Thousand Dollars ($85,000). Such salary shall be payable in equal installments, at least monthly on the last day of each month or at more frequent intervals in accordance with the Company's customary pay schedule, subject to such increases as the Chief Executive Officer may determine to award from time to time in his sole discretion.

4.2 Bonus. Upon execution of this agreement the Employee will be paid a one time bonus of Twelve Thousand Dollars (~~$12,000~~ 500).

Based upon the Employee's completion of all or substantially all of the Annual Performance Objectives as determined by the Company's Chief Executive Officer and as set forth in Exhibit B as they may be revised, modified or amended pursuant to Paragraph 3 above, the Employee shall accrue an annual bonus in the amount of (1) Ten Percent (10%) of his base salary for the period ending December 31, 1999 on a prorata basis; (2) Fifteen Percent (15%) of his base salary for the period ending December 31, 2000; (3) Twenty Percent (20%) of his base salary for the period ending December 31, 2001; and (4) Twenty Percent (20%) of his base salary for the period ending December 31, 2002. Payment of annual bonus compensation to the Employee will be made not later than April 15th of the fiscal year following each bonus period.

4.3 Additional Benefits. Employee shall be eligible to participate in the Company's other employee benefits plans, if and when such plans may be adopted, including merit bonus plans, pension or profit sharing plans, and those plans covering life,

disability, health, and dental insurance in accordance with the rules established in the discretion of the Management Committee for individual participation in any such plans as may be in effect from time to time.

4.4 Performance Units Plan Participation.

Employee shall be entitled to participate fully in the Company's Performance Units Plan (the "Plan"), established effective January 1, 1999, attached hereto as Exhibit C and incorporated herein by reference. The provisions of the Plan and any subsequent amendments thereto are fully applicable to this subparagraph unless otherwise stated herein.

As of the Effective date of this Agreement, the Employee shall be granted Five Thousand (5,000) Performance Units (as defined in the Plan and any amendments thereto). At the conclusion of fiscal years 2000, 2001 and 2002, the Employee shall be granted an additional Five Thousand (5,000) Performance Units for each year of employment which qualifies as a "Targeted Year of Service" as defined in the Plan, provided all or substantially all of the Annual Performance Objectives for the Target Year of Service are completed. Notwithstanding the requirements of Section 3.03, Employee will be 100% vested in granted Participation Units upon their issuance. In the event Performance Objectives are not met in any Target Year of Service and Performance Units are not awarded, such Performance Units will not be forfeited. Such Performance Units will be awarded, if earned, over the remaining years of the term of the Agreement in equal amounts. Employee is entitled under this Agreement to no more than the Twenty Thousand (20,000) Performance Units but the Company may elect, in its sole discretion, to award additional Performance Units under such conditions as it deems appropriate.

Notwithstanding the vesting provisions of Paragraph 3.03 of the Plan, and for the purposes of this Employment Agreement alone, Performance Units shall vest fully for the purposes of Paragraphs 4.01 and 4.02 of the Plan at the time the

Performance Units are granted to Employee, subject to the forfeiture provisions of Paragraph 4.03 as modified below.

Notwithstanding the provisions of Paragraph 4.03 of the Plan, and for the purposes of this Employment Agreement alone, Employer agrees that it will not require Employee to forfeit vested or unvested Performance Units in the event Employee is terminated for "cause" subsequent to the third anniversary of employment under this Agreement. Employer expressly reserves the right to require forfeiture of, and Employee shall immediately forfeit, vested or unvested Performance Units if Employee is terminated for cause prior to such third anniversary of employment as defined in Paragraph 6.02 subparagraphs (1), (2), (3) and (4) of the Agreement, exclusively.

Notwithstanding the forfeiture provisions of Paragraph 4.03 of the Plan, and for the purposes of this Employment Agreement alone, Employer and Employee further agree that Employer shall have the right to require forfeiture of, and Employee shall immediately forfeit, all vested and unvested Performance Units in the event that Employee elects to terminate this Agreement pursuant to Paragraph 6.1 below prior to third anniversary of employment.

4.5 Vacation, Sick Leave, and Holidays. Employee shall be entitled to an aggregate of up to 15 days of leave for vacation each calendar year during the term of the Agreement at full pay. Employee may not accumulate vacation days in excess of 15 days. The Company will pay Employee for all accrued unused vacation time at the time of termination of employment. Upon termination, the Company will pay Employee for a maximum of 15 days of unused vacation.

4.6 Deductions. The Company shall have the right to deduct from any Compensation due to the Employee hereunder any and all sums required for social security and withholding taxes and for any other federal, state, or local taxes or charges which may be hereafter enacted or required by law as charge on the compensation of Employee.

5. Business Expenses

The Company shall promptly reimburse Employee for all reasonable out-of-pocket business expenses he incurs in fulfilling his duties hereunder, in accordance with the general policies of the Company in effect from time to time, provided that Employee furnishes to the Company adequate records and other documentary evidence required by all federal and state statutes and regulations issues by the appropriate taxing authorities for the substantiation of such business expenses as a deduction on the federal or state tax returns of the Company.

6. Termination

6.1 Termination by Employee. This Agreement and Employee's employment hereunder shall terminate upon written notice from Employee to the Company, including a statement to the Employer of the grounds therefore. This Agreement shall also terminate upon Employee's death. Employee or his representative shall be entitled to compensation and benefits to the date of termination of employment unless otherwise provided herein. Employee shall not be entitled to any severance payments.

6.2 Termination of Employee for Cause. This Agreement and Employee's employment hereunder is immediately terminable for "cause" (as defined below) upon written notice from the Company to the Employee, which notice shall contain a statement of the grounds therefore. Any notice under this subparagraph shall also be given to any beneficiary of any benefit provided by the Company pursuant to this Agreement, provided that the Company has received written notice of the identity, status, and address of such other beneficiary.

As used in this Agreement, "cause" shall include: (1) habitual neglect of, or deliberate or intentional refusal to perform, his duties and obligations under this Agreement, (2) fraudulent or criminal activities, (3) any grossly negligent or unethical activity, (4) any activity that causes substantial harm to the

Company, its reputation, or its directors or employees, or (5) failure to meet, comply with, and accomplish the annual Performance Goals and Objectives set forth in Exhibit "A" attached hereto. Employee acknowledges that such Goals and Objectives are subject to annual review, modification, and amendment in the discretion of the Chief Executive Officer to reflect changes in performance criteria. A determination of whether Employee's actions justify termination for cause and the date on which such termination is effective shall be made by the Company's Management Committee in its sole discretion. In the event Employee's employment is terminated for "cause", Employee shall be entitled only to compensation and benefits due as of the date of termination of the employment unless otherwise provided herein. Employee shall not be entitled to any severance payments.

6.3 Termination of Employee without Cause. The Company may terminate Employee other than for "cause" upon written notice to the Employee. Such notice shall contain a statement of the grounds therefore. Any notice under this subparagraph shall also be given to any beneficiary of any benefit provided by the Company pursuant to this Agreement, provided that the Company has received written notice of the identity, status, and address of such other beneficiary.

6.4 Termination for Disability. The Company may terminate this Agreement for any disability (as defined below) of the Employee at the expiration of a three (3) consecutive month period of disability if the Company determines, in its sole discretion, that Employee's condition or disability will prevent him from substantially performing his essential duties hereunder. As used in this Agreement, "disability" shall be defined as (1) Employee's inability, by reason of physical or mental illness or other cause, substantially to perform his essential duties hereunder, or (2) in the discretion of the Company, as that term is defined in any disability insurance policy in effect at the Company during the time in question. Employee shall receive full compensation, benefits, and reimbursement of expenses pursuant to Paragraphs 4 and 5 above from the date the disability begins until the date he

receives written notice of termination and the grounds therefore under this subparagraph or until Employee begins to receive disability benefits pursuant to a Company disability insurance policy, whichever occurs first.

6.5 Effect of Termination. In the event that Employee's employment is terminated hereunder, all obligations of the Company and all obligations of Employee shall cease except as provided in Paragraph 4.4 above and Paragraphs 6.3, 7 and 8 below. Upon such termination, Employee, his representatives, or his estate shall be entitled to receive only the compensation, benefits, and reimbursements earned or accrued by him under Paragraphs 4 and 5 above prior to date of termination, computed pro rata up to and including the date of termination.

Employee shall not be entitled to any further compensation, benefits, or reimbursement following such date, except as specifically provided in Paragraphs 4.4 and 6.3 above.

7. Non-solicitation

7.1 Covenant. Employee hereby agrees that, while employed by the Company pursuant to this Agreement, and during the 12-month period following the termination of employment hereunder, Employee will not directly or indirectly induce, request or advise any person or entity to withdraw, curtail, or cancel that person's or entity's business or prospective business with the Company. Employee agrees that, while employed by the Company pursuant to this Agreement, and during the 6-month period following the termination of employment hereunder, Employee will not directly or indirectly solicit or induce any employee of the Company to leave the employ of the Company.

7.2 Enforceability. If any of the provisions of this Section 7 is held unenforceable, the remaining provisions shall nevertheless remain enforceable, and the court making such determination shall modify, among other things, the scope or duration of this Section 7 to preserve the enforceability hereof to the maximum extent then permitted by law. In addition, the enforceability of

this Section 7 is also subject to the injunctive and other equitable powers of a court as described in Section 10 below.

8. Confidential Information

Employee acknowledges that during his employment with the Company, Employee will develop, discover, have access to, and become acquainted with technical, financial, marketing, customers, prospective customers, personnel, and other information relating to the present or contemplated products or the conduct of business of the Company which is of a confidential and proprietary nature ("Confidential Information"). Employee agrees that all files, records, documents, and the like relating to such Confidential Information, whether prepared by him or otherwise coming into his possession, shall remain the exclusive property of the Company, and Employee hereby agrees to promptly disclose such Confidential Information to the Company upon request and hereby assigns to the Company any rights which he may acquire in any Confidential Information. Employee further agrees not to disclose or use any Confidential Information and to use his best efforts to prevent the disclosure or use of any Confidential Information either during the term of his employment or at any time thereafter, except as may be necessary in the ordinary course of performing his duties under this Agreement. Upon termination of Employee's employment with the Company for any reason, Employee shall promptly deliver to the Company all materials, documents, data, equipment, and other physical property of any nature containing or pertaining to any Confidential Information, and Employee shall not take from the Company's premises any such material or equipment or any reproduction thereof.

9. No Conflicts

Employee hereby represents that, to the best of his knowledge, his performance of all terms of this Agreement and his work as an Employee of the Company does not breach any oral or written agreement which the employee has made prior to his employment with the Company.

10. Equitable Remedies

Employee acknowledges and agrees that the breach or threatened breach by him of certain provisions of this Agreement, including without limitations Sections 7 and 8 above, would cause irreparable harm to the

Company for which damages at law would be an inadequate remedy. Accordingly, Employee hereby agrees that in any such instance the Company shall be entitled to seek injunctive or other equitable relief in addition to any other remedy to which it may be entitled.

11. Assignment

This Agreement is for the unique personal services of Employee and is not assignable or delegable in whole or in part by Employee without the consent of the Management Committee of the Company. This Agreement may be assigned or delegated in whole or in part by the Company and, in such case, the terms of this Agreement shall inure to the benefit of, be assumed by, and be binding upon the entity to which this Agreement is assigned.

12. Waiver or Modification

Any waiver, modification, or amendment of any provision of this Agreement shall be effective only if in writing in a document that specifically refers to this Agreement and such document is signed by the parties hereto.

13. Entire Agreement

This Agreement constitutes the full and complete understanding and agreement of the parties hereto with respect to the subject matter covered herein and supersedes all prior oral or written understandings and agreements with respect thereto.

14. Severability

If any provision of this Agreement is found to be unenforceable by a court of competent jurisdiction, the remaining provisions shall nevertheless remain in full force and effect.

15. Notices

Any notice required hereunder to be given by either party shall be in writing and shall be delivered personally or sent by certified or registered mail, postage prepaid, or by private courier, with written verification of delivery, or by facsimile transmission to the other party to the address or telephone number set forth below or to such other address or telephone

number as either party may designate from time to time according to this provision. A notice delivered personally shall be effective upon receipt. A notice sent by facsimile transmission shall be effective twenty-four hours after the dispatch thereof. A notice delivered by mail or by private courier shall be effective on the next business day following the day of mailing.

(a) To Employee at: 11627 Chenault Street

Los Angeles, CA 90049

(b) To the Company at: Altres Financial, L.P.
2323 S. Foothill Blvd.
Salt Lake City, Utah 84109

16. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

IN WITNESS WHEREOF, Employee has signed this Agreement personally and the Company has caused this Agreement to be executed by its duly authorized representative.

ALTRES FINANCIAL, L.P.

By: _____
Its: CEO

Donald J. Carvelas

_____

EXHIBIT A

JOB DESCRIPTION

POSITION: Vice President, Underwriting

POSITION SUMMARY: Responsible for analysis, structuring and due diligence process related to the underwriting of all factoring transactions. Responsible for the timely processing of all factoring transactions from receipt of Term Sheet from Client through the preparation, negotiation and execution of legal documentation.

REPORTING RELATIONSHIP: Chief Executive Officer

MAJOR ACCOUNTABILITIES:

- Ensure underwriting process is consistent, responsive and that processing times meet established objectives. Standard procedures detailing the specific activities and tasks related to the underwriting process are to be created and revised on an as needed basis;
- Maintain the communication process with business development officers at a level which will ensure continuity and consistency in the transfer of information to the customer during the underwriting process;
- Maintain an internal communication process with appropriate operations staff members that will ensure an efficient and timely underwriting, documentation and funding process which meets the needs of the customer and the company
- Perform a level of analysis and due diligence on factoring transactions that is appropriate to the dollar amount and risks associated with the transaction;
- Maintain responsibility for scheduling survey audits on all prospective clients, as needed.
- Ensure that the underwriting and due diligence process related to factoring transactions are submitted to the company's Credit Committee in a written form

with sufficient information to allow for a decision to approve or reject the transaction based upon the facts of the underwriting results. Recommendations are to be clearly stated, including comments related to an appropriate level of ongoing account management

EXHIBIT B

The following goals and objectives are set for the performance of Donald J. Carvelas ("Employee") in the capacity of Vice President, Underwriting of ALTRES Financial, L.P. ("Company")

The successful completion of all or substantially all of these terms will entitle the Employee to receive a cash bonus equal to Ten Percent (10%) of Employee's base pay to be payable not later than April 15, 2000.

The Company's Chief Executive Officer ("CEO") or designee will conduct a formal review of Employee's performance on or before January 31, 2000. In the event this review does not take place by January 31, 2000, Employee will be deemed to have successfully completed all or substantially all of the required goals and objectives.

In the event Employee does not achieve all or substantially all the goals and objectives, the CEO or designee may reduce the percentage of the cash bonus paid to the Employee.

Goals and Objectives

To be determined and mutually agreed upon not later than August 31, 1999.

Tab 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DONALD J. CARVELAS,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 050909568
vs.	:	
SUMMIT FINANCIAL RESOURCES, L.P.,	:	
Defendant.	:	

Before the Court is a Notice to Submit for Decision on defendant's Motion for Summary Judgment. The Court having reviewed the pleadings filed in this matter and having further heard oral argument of counsel, now enters the following ruling.

The defendant's Motion for Summary Judgment is granted. This ruling is based upon the Court's determination that the contract at issue in this matter is clear and unambiguous, both as to bonuses and termination of plaintiff's employment. As to the contract dealing with bonuses through December 2002, the contract clearly specifies that whether or not plaintiff met the goals and objectives of his employment was within the sole discretion of the chief executive officer. The fact claimed by plaintiff that he was never advised of any goals or objectives is immaterial given the clear and unambiguous terms of the contract.

With regard to any bonuses after 2002, plaintiff argues that extrinsic evidence is necessary to provide meaning to the contract.

However, quite specifically, the agreement provides for no bonuses after December 2002, and there is no ambiguity in that language.

As to plaintiff's termination, plaintiff agreed that he could be terminated without cause. Again, the Court finds that there is no ambiguity in the terms and conditions of the contract, and that defendant terminated plaintiff without cause, specifying their basis as being without cause.

Based upon that, the defendant's Motion for Summary Judgment seeking a determination that based upon the written employment agreement, that defendant did not breach its obligations under the agreement, is granted.

Counsel for defendant is requested to prepare an Order consistent with this ruling.

Dated this 1 day of October, 2005

SANDRA N. PEULER
DISTRICT COURT JUDGE

STATE OF UTAH
DISTRICT COURT
SALT LAKE CITY COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 2 day of ~~October~~ Nov, 2005:

Gregory W. Stevens
Attorney for Plaintiff
2825 E. Cottonwood Parkway, Suite 500
Salt Lake City, Utah 84121

John A. Beckstead
David P. Williams
Attorneys for Defendant
15 W. South Temple, Suite 1200
Salt Lake City, Utah 84101-1004

K Gyotopas